



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: PA/01819/2017  
PA/14298/2016

THE IMMIGRATION ACTS

Heard at Newport  
On 16 October 2017

Decision & Reasons Promulgated  
On 8 November 2017

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

NYADE  
CYSDB

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: No representative; the 2nd appellant's husband acting as a McKenzie friend

For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellants. This direction applies to both the appellants and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

## **Introduction**

2. The appellants are citizens of El Salvador. They were born respectively on 21 October 1963 and 12 August 1986. The first appellant is the second appellant's mother. The first appellant entered the United Kingdom on 8 February 2016 and claimed asylum. Her application was refused on 13 February 2017.
3. The second appellant entered the United Kingdom on 12 November 2012, together with her husband. He claimed asylum on 29 November 2012 with the second appellant as his dependant. His claim for asylum was refused and his subsequent appeal dismissed.
4. On 17 June 2016, the second appellant applied for asylum in her own right. That application was refused on 16 December 2016.
5. The basis of the appellants' claims for asylum was that they feared gang-based violence on return to El Salvador. They claim to fear a gang known as "Mara 18" whom, they claim, had raped, "D" who is also the daughter of the first appellant and the sister of the second appellant.

## **The Appeal to the First-tier Tribunal**

6. Both appellants appealed to the First-tier Tribunal. In a decision promulgated on 21 April 2017, Judge Powell dismissed each of their appeals.
7. The appellants sought permission to appeal to the Upper Tribunal. Permission to appeal was initially refused by the First-tier Tribunal but on 17 July 2017 the Upper Tribunal (UTJ Finch) granted the appellants permission to appeal.
8. On 4 August 2017, the Secretary of State filed a rule 24 notice seeking to uphold Judge Powell's decision.

## **The Hearing**

9. The appellants were unrepresented before me. Previously, including at the hearing before Judge Powell, they were represented by Duncan Lewis, Solicitors. They have, however, made a complaint against their former representatives in relation to the conduct of the proceedings before Judge Powell and are no longer represented by them.
10. The second appellant's husband (and first appellant's son-in-law) ("M") requested that he assist the appellants as a McKenzie friend. Without objection from Mr Richards, who represented the Secretary of State, I agree that he could do so.
11. At the outset of the hearing, I raised with "M" (the McKenzie friend) that no Spanish interpreter was available for the proceedings. Having consulted with the appellants, I was informed that they were content to proceed in the absence of an interpreter in dealing with the error of law issues. It was plain that "M" spoke (and indeed wrote) to a high level in English and that the second appellant was able to understand the

proceedings in English. Where necessary, either “M” or the second appellant explained any matter to the first appellant in Spanish.

12. At the outset, I explained to “M” the purpose of the hearing in the Upper Tribunal which was to consider whether, on the basis of the grounds upon which permission had been granted, the First-tier Tribunal’s decision was unsustainable in law. “M” acknowledged that fact and referred me to detailed written documents raising legal challenges to Judge Powell’s decision and to which he added further comments orally.

### **The Grounds**

13. The appellants’ grounds essentially rely upon a fairness argument. Both in the supporting documents and orally before me, M argued that the judge had unfairly proceeded with the hearing (and had not adjourned it) when it became apparent that D’s evidence was crucial to the outcome of the appeals.
14. Initially, M also relied upon a contention that the judge had failed to consider all the material in the bundles before him. However, following a short adjournment in which he sought to identify the material that had not been considered, M accepted that the material he relied upon had, in fact, not been put before the judge.
15. M also submitted that the judge had been wrongly influenced by the respondent’s position at the hearing that D had not been truthful. I need say no more about that ground other than to state it is simply unsustainable. It is clear on any fair reading of the judge’s determination that he made his own decision based upon the evidence before him that the appellants had not established their case based upon the claimed rape of D by gang members which had been reported to the police.
16. In granting permission UTJ Finch considered that it was arguable that the judge’s decision not to adjourn the hearing was unlawful. Her reasons were as follows:

“The Appellants’ solicitor applied for an adjournment in order for a decision to be reached on the daughter/sister’s application. The First-tier Tribunal Judge refused this application but then relied upon the failure to provide further evidence about her claim as a reason to dismiss the appeal.

When refusing the appeal the First-tier Tribunal Judge did not remind himself of the totality of the overriding objectives and the need to ensure that a hearing adhered to the principle of being in the interests of justice. He merely referred to the delay that would be caused by any such adjournment.

It was also clear from the decision that the evidence that had been submitted by the Appellants’ solicitors was incomplete and disorganised. This also indicated that it was not in the interests of justice to proceed.

As a consequence, I am satisfied that First-tier Tribunal Judge Powell’s decision and reasons did contain arguable errors of law and, therefore, it is appropriate to grant the Appellants permission to appeal.”

17. For the reasons I give below, I accept that the ground that UTJ Finch found to be arguable is, in fact, established.

### Discussion

18. Before Judge Powell, there was no evidence from D and the judge was told that D would not be called to give evidence. At the time of the hearing, and indeed this remains the case, the Secretary of State had not reached a decision on D's application for asylum. The judge identified with the appellants' legal representative "difficulties" given the Secretary of State's position that, having not decided her application, there was no concession that D had been raped and, on the basis of what he was told by the appellants' legal representative, D would not give evidence and there was no written evidence from her, including any asylum interview record.
19. In the light of that, the judge was asked to adjourn the hearing in order that a decision could be reached on D's application. There was also an application to adjourn in order that further translations could be obtained of some documents. The judge dealt with this at para 20 of his determination as follows:

"20. I undertook case management at the start of the proceedings having identified the difficulties to which I have alluded in this part of my decision. The Presenting Officer did not seek an adjournment to provide me with further evidence and maintained her position that the factual matrix involving [D] was not accepted. Ms Davies invited me to allow her time to file further translations of the police documents but did not seek an adjournment in order to file evidence from [D], her proceedings or from the first appellant's husband. She invited me instead to adjourn to await the Secretary of State's decision in [D's] case but having asked further questions, I was not satisfied that there was a realistic current timetable for the determination of her claim. Mindful of the overriding objective in these proceedings I did not consider it appropriate to delay these proceedings to await that decision, particularly as a positive decision had been made by the appellants to proceed without [D's] evidence."

20. It is plain that the appellants' claims arose out of the events which were central to D's claim for asylum, namely her rape and subsequent reporting to the police. It is, therefore, a matter of some concern that the Secretary of State did not decide the principal asylum-seeker's claim before deciding the claims of these appellants which were, in all material respects, contingent upon D's claim being accepted. It is apparent that no explanation was made available to the judge at the hearing, despite his concerns. Before me, Mr Richards was able to provide no further assistance on this issue. However, D's claim still remains undetermined by the Secretary of State.
21. In the light of that, it is perhaps not surprising that a decision was taken not to call D to give evidence at the hearing. The appellants have put into evidence documents relating to a complaint that they have subsequently made against their (then) legal representatives, Duncan Lewis. In the exchange of correspondence, it is made plain in a response to the complaint from Duncan Lewis dated 21 July 2017 that D's own legal representatives, who were not Duncan Lewis, had declined to link D's case to the appeals of these appellants. There is also, set out in that letter, a transcription from a telephone conversation with the second appellant in which she said: "what

worries me is how it will affect my sister when she would have to present evidence before she has received a decision in her own case. I don't want to affect her case because she is likely to receive a positive decision".

22. It is apparent from that correspondence that, in consultation with their legal representatives, the appellants decided not to call D to give evidence. Although the contrary was suggested before me, it is plain from the correspondence that the appellants declined to call D on legal advice. That legal advice was, no doubt, highly influenced by the position of D's own legal representatives.
23. No doubt, also, that led the appellants' legal representative to make the application to Judge Powell to adjourn the hearing in order that a decision could be made in respect of D's application. As I have already set out, for the reasons in para 20 of his determination he declined to do so.
24. The judge correctly identified that he had to apply the overriding objective which is set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2604/2014). That provides as follows:
  - "2 (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
  - (2) Dealing with a case fairly and justly includes -
    - (a) dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
    - (b) avoiding unnecessary formality and seeking flexibility in the proceedings; and
    - (c) ensuring, so far as practical, that the parties are able to participate fully in the proceedings;
    - (d) using any special expertise of the Tribunal effectively; and
    - (e) avoiding delay, so far as compatible with proper consideration of the issues."
25. Sub-paragraph (4) goes on to state that:

"Parties must -

  - (a) help the Tribunal to further the overriding objectives; and
  - (b) cooperate with the Tribunal generally."
26. Self-evidently, therefore, the overriding objective is fairness and the interests of justice. That is entirely consistent with the approach to adjournments set out by the Upper Tribunal in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). In that decision, the (then) President (McCloskey J) said this at [7]:

“7. If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party’s right to a fair hearing? Any temptation to review the conduct and decision of the FtT through the lens of reasonableness must be firmly resisted, in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion.”

At [8], the President emphasised the cardinal requirement of “fairness” as follows:

“Alertness to this test by Tribunals at both tiers will serve to prevent judicial error. Regrettably, in the real and imperfect world of contemporary litigation, the question of adjourning a case not infrequently arises on the date of hearing, at the doors of the court. I am conscious, of course, that in the typical case the Judge will have invested much time and effort in preparation, is understandably anxious to complete the day’s list of cases for hearing and may well feel frustrated by the (usually) unexpected advent of an adjournment request. Both the FtT and the Upper Tribunal have demanding workloads. Parties and stakeholders have expectations, typically elevated and sometimes unrealistic, relating to the throughput and output of cases in the system. In the present era, the spotlight on the judiciary is more acute than ever before. Moreover, Tribunals must consistently give effect to the overriding objective. Notwithstanding, sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties’ right to a fair hearing. In determining applications for adjournments, Judges will also be guided by focussing on the overarching criterion enshrined in the overriding objective, which is that of fairness.”


27. In my judgment, in para 20 the judge did not adequately deal with the issue of fairness derived from the overriding objective. He was, of course, faced by the Secretary of State’s position that no decision had been made on D’s application and the “frankly, unhelpful position taken before him that there was no current timetable to reach such a decision”. Given that D was the principal asylum-seeker, common sense and fairness required a decision to be reached on her claim before that of these appellants. I struggle to understand how the position of the Secretary of State was compliant with rule 2(4) of the Procedure Rules as helping the Tribunal to further the overriding objective or cooperating with it.
28. However, the main point is that fairness, in my judgment, required a decision in respect of D’s application, otherwise the appellants were, in effect, faced with a dilemma (even with legal advice) of either seeking to lead evidence from D (probably implicitly against the advice of her legal representatives who did not wish her claim to be linked) or proceeding without the evidence of the principal asylum-seeker who could give the best evidence concerning the events relied upon – at one remove – by the appellants in this case. The latter, of course, effectively required the appellants to present their case with ‘one hand tied behind their backs’. Indeed, the absence of D’s evidence was repeatedly referred to by the Judge in his reasons leading to his adverse factual findings.

29. Further, in my judgment, the judge's emphasis in para 20 upon the "delay" to the proceedings, whilst a relevant factor, was not of sufficient weight to overcome the patent unfairness to the appellants of proceeding with their appeals in the circumstances.
30. In the result, there was substantial prejudice to the appellants in proceeding with the appeals. For those reasons, I am satisfied that it was unfair to proceed with the hearing and not to grant the adjournment as requested.
31. That was a material error of law and the judge's decision cannot stand and is set aside.

### **Disposal**

32. Given the basis for setting aside the decision, the only appropriate disposal of this appeal is that it be remitted to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Powell.
33. The appeal should be listed in such a way that the Secretary of State is able to make a decision in respect of D's claim for asylum prior to that hearing.

Signed



A Grubb  
Judge of the Upper Tribunal

7 November 2017